

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VICKY DYKES, Personal Representative of the  
Estate of JAMES DYKES, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

CHARLES MAIN, M.D.,

Defendant.

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VICKY DYKES, Personal Representative of the  
Estate of JAMES DYKES, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

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June 19, 2001  
9:00 a.m.

No. 214284  
Oakland Circuit Court  
LC No. 97-538719-NH

No. 218386  
Oakland Circuit Court  
LC No. 97-538719-NH

Updated Copy  
August 31, 2001

Before: Neff, P.J., and Talbot and J. B. Sullivan,\* JJ.

NEFF, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's decision to affirm the trial court's grant of summary disposition for defendant.

I

As noted by the majority, plaintiff's malpractice claim was premised on the theory that had defendant not been negligent, James more probably than not would have survived his infection, as Dr. Trigg stated in his affidavit:

Within a reasonable medical probability had the standard of care been followed, James Dykes would [have] had a greater then [sic] 50% chance of surviving the infectious process from which he suffered; thus, the violation from the standard of care is a proximate cause of the damages claimed by Plaintiff.

The circuit court found that plaintiff failed to establish causation because, contrary to his affidavit statement, Dr. Trigg testified during his deposition "that he could not say within a reasonable degree of medical certainty that a bronchoscopy or antibiotic treatment would have made a difference in the outcome and prolonged [James'] life." My review of Dr. Trigg's deposition testimony does not convince me that his answers to defense counsel's deposition questions defeat causation, as defendant contends and the majority concludes. I read the responses as more a reluctance to state his conclusions in terms of absolute certainties, rather than evidence that causation was lacking under the more probable than not standard.

During Dr. Trigg's deposition, he responded to defense counsel's specific questions, none of which addressed whether it was "more probable than not" that James would have survived his infection absent defendant's alleged negligence. Counsel queried Dr. Trigg whether there was any way of "knowing" whether, "if [James] had received anti-pseudomonas medication during the February 12 hospitalization, that he would have lived longer than April 2, 1992." Dr. Trigg responded that there was "no way of knowing that." I cannot conclude that this testimony defeats causation. The standard for causation in this instance is whether it is more likely than not that James would have survived the infectious process, i.e., a greater than fifty percent chance, not whether he definitively would have lived beyond a certain date, i.e., a one-hundred percent probability. For the same reason, I do not find the fact that Dr. Trigg could not opine concerning James' life expectancy dispositive with regard to the issue of causation.

Defense counsel queried Dr. Trigg analogously with regard to defendant's failure to perform a bronchoscopy or an open lung biopsy:

*Q.* [I]s it a fair statement to say that neither you nor I, as we sit here today, know what, if anything, a bronchoscopy would have revealed during that time [the February 7 to February 9, 1992 hospitalization]?

*A.* That's a fair statement.

*Q.* And is it also fair to say that because we don't know that, neither you nor I, or anyone can say within a reasonable degree of medical certainty that a bronchoscopy during that February 7 through 9, 1992 hospitalization would have made any difference in James Dykes' outcome and prolonged his life?

*A.* That's a fair statement.

\* \* \*

Q. [I]s it fair to say that as we sit here today, neither you nor I can conclude, or anyone else, what a bronchoscopy and or an open lung biopsy would have revealed during the February 12 hospitalization within a reasonable degree of medical certainty? Is that a fair statement?

A. My clinical judgement and assessment is it would have revealed a bacterial problem. I think that it would have been very useful, but I can't know that for certain.<sup>[1]</sup>

In view of the line of questioning, which speaks more to absolutes than probabilities, I strongly disagree that Dr. Trigg's deposition testimony defeats any link of causation between the diagnosis and treatment of James' respiratory infection and his ultimately succumbing to pseudomonas septicemia.

Finally, I cannot conclude that Dr. Trigg's testimony with regard to pseudomonas sepsis, in particular, defeats causation in this case.<sup>2</sup> I recognize that the cause of death was determined to be pseudomonas septicemia. However, plaintiff's claim of malpractice was based on defendant's failure to properly diagnose and aggressively treat James' infection in the early stages, before it could progress to the stage that it was likely to be fatal, given his medical history. Dr. Trigg opined that James' condition made him particularly susceptible to bacterial infections, that his symptoms during the early February hospitalization indicated an acute bacterial infection, and that defendant should have acted accordingly. Dr. Trigg's affidavit statement is that, had defendant not violated the standard of care, James more likely than not would have survived the infectious process, i.e., there was a greater than fifty percent chance the infection would not have progressed to sepsis/septicemia. I cannot conclude from the record that plaintiff's theory is defeated by the fact that pseudomonas sepsis is more often than not a fatal infection for immunocompromised patients.

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<sup>1</sup> Dr. Trigg's response to counsel's next question further convinces me that his answer to the previous question was an expression of his reluctance to state an absolute certainty, rather than an inability to provide the vital link of causation:

Q: Do you have any idea what bacteria it would have identified?

A: No. Except that there was a sputum culture obtained in early February which showed on gram stain numerous gram-negative bacilli and neutrophils. And there was a dermatology consultation which suggested a pseudomonas-like rash during this hospitalization. So it certainly was within the differential that a pseudomonas infection could be found.

<sup>2</sup> Dr. Trigg stated: "I think that patients who have compromised immune systems that are [sic] following a bone marrow transplant who develop a pseudomonas sepsis have a greater-than-fifty-percent chance of dying of their infection, but it's not a hundred percent chance."

The record evidence in this case presents a close question with regard to the issue of proximate causation. However, the summary disposition standard requires that we view the evidence in a light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). My reading of Dr. Trigg's deposition testimony leaves me unconvinced that it negates his affidavit statement that, had the standard of care been followed, James would have had a greater than fifty percent chance of surviving the infectious process. Where there is a genuine issue of material fact with regard to causation, summary disposition is improper. *Id.* at 454-455; *Bilicki v W T Grant Co*, 382 Mich 319, 323-326; 170 NW2d 30 (1969). I would reverse the order dismissing plaintiff's malpractice case and remand this matter to the trial court for further proceedings.

## II

I fully concur in the reasoning and result reached by the majority with regard to the award of costs to defendant under MCR 2.403(L)(3).

/s/ Janet T. Neff